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The International Code of Marketing of Breastmilk Substitutes: A model for assuring children's nutrition rights under the law

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This article argues that the *International Code of Marketing of Breastmilk Substitutes*, adopted by the World Health Assembly in 1981, is part of the body of human rights instruments that have been developed under the auspices of the United Nations since the *Universal Declaration of Human Rights* was proclaimed in 1948. The human rights that the *Code* attempts to protect are the rights to health and life, the rights to food and nutrition, and the right of women to full and accurate information on which to base decisions affecting their children's health. Because national laws based on the *Code* are being adopted by a growing number of countries, the *Code* provides a useful model for transforming "soft" international law, which enumerates and defines rights, into "hard" national law that protects and enforces rights.

The adoption of a *Code* outlining minimum standards for the marketing of lucrative products manufactured and distributed by a small number of powerful transnational companies was, at its heart, a political process. Similarly, adopting national laws which can enforce the rights that the *Code* protects, requires a confluence of political forces – committed policy makers, informed and engaged health professionals, and citizen advocates active in non-governmental organizations.

Protecting human rights through international negotiation and cooperation is a drama that is continuously unfolding. This story is an unusually clear example of how international action can be taken to restrict marketing and promotion practices having specific harmful effects.

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Background: Breastfeeding is best

Breastfeeding is the unequaled way of providing the ideal food for infants. Breastmilk is an infant's first "immunization". The dangers associated with not breastfeeding – that is bottle feeding with a breastmilk substitute – are well known. Since breastmilk is a live substance, containing immunological and anti-infective properties, bottle-fed babies have more severe and greater numbers of infections, diarrhoea and diseases which can lead to malnutrition and even death. As pointed out in *Lancet*:

> In countries with a moderate or high infant mortality rate, artificially fed infants are at least 14 times more likely to die from diarrhoea than are breastfed children, and 4 times more likely to die from pneumonia. Even in countries where infant mortality is low, artificially fed infants require hospital treatment up to 5 times more often than those who are fully or partly breastfed.[1]

The United Nations Children's Fund (UNICEF) and the World Health Organization (WHO) estimate that more than 1 million infant lives could be saved each year through effective breastfeeding.

By the late 1970's it became clear to UNICEF, WHO, and a small group of dedicated health professionals who were leading the way, that breastfeeding was declining precipitously on a global scale, and that the aggressive marketing and promotion of breastmilk substitutes was seriously exacerbating the trend. Promotion of breastmilk substitutes was inducing mothers, medical personnel and health institutions to abandon breastfeeding. Breastfeeding was "old fashioned", while substitutes were modern and "Western". Meanwhile, bottle feeding, particularly for those in poverty, posed predictable risks. Infants were frequently fed diluted or contaminated food without any of the anti-infective benefits of breastmilk. This was and remains a public health disaster, having especially negative economic results for poor countries. While scarce capital pays for unnecessary imported commercial baby food products, high levels of infant mortality and morbidity result in higher health care costs.

In 1981, after two years of intense and often fractious negotiations, the World Health Assembly (WHA), the governing body of the World Health Organization, adopted the *International Code of Marketing of Breastmilk Substitutes*. The *Code* protects breastfeeding by restricting certain marketing practices for breastmilk substitutes. Every section of the *Code* was a reaction

[1] Editorial, "A Warm Chain for Breastfeeding", *The Lancet*, Vol. 344 (November 5, 1994), 1239.

to marketing and promotion practices which exploit the uncertainties of new mothers. The *Code's* position is that commercial products should be available when needed, but should not be promoted.

The *Code*, like the United Nations' *Universal Declaration of Human Rights*, is not a treaty, but an intergovernmental resolution. Thus, while not legally binding, it establishes internationally recognized minimum standards that Member States are urged to incorporate into national law. Today, more than fifteen years after it was adopted, more than half of the world's population live in countries where the *Code* has been adopted, fully or partially, as national law. To achieve these results has been a struggle of enormous proportions.

Highlights of the International Code

The *Code* consists of a preamble and 11 articles, most with several subparagraphs detailing specific requirements. Its features include the following:

- The Code applies to a relatively broad scope of products – all breastmilk substitute products and other products which are used as a partial or total replacement of breastmilk, bottles and teats.
- All advertising and promotion to the general public is banned. This includes forbidding the distribution of free samples, gifts and other promotional materials, and eliminating direct or indirect contact between marketing personnel and pregnant women and mothers.
- Promotion is banned in health care facilities. This includes banning displays of products, placards and the use of "mothercraft nurses" to promote products. "Mothercraft nurses" are nurses or sales people dressed as nurses who are hired to promote products.
- Informational and educational materials about breastmilk substitutes are permitted. However, the materials must be scientific and factual, and must include information on all of ten points listed in the *Code*, including, for example, the superiority of breastfeeding, the difficulty of reversing the decision not to breastfeed, the financial implications of buying commercial substitutes, and the health hazards of improper use. No pictures or text may idealize the use of breast-milk substitutes, or imply equivalency with breastmilk.
- To discourage the routine use of formula in hospitals, the *Code* restricts "donations" (free supplies) and low-cost supplies of breastmilk substitutes only to charity cases where a breastmilk substitute is deemed necessary.
- The Code designates a specific list of label requirements. Labels must, among other things, include the message that the product only be used

on the advice of a health worker who can instruct on the proper method of use. Also, labels may not show pictures of babies or idealize, through either words or images, the use of infant formula.

- The *Code* assigns implementation and monitoring responsibilities among the various parties: governments, manufacturers and distributors, non-governmental organizations and professional groups.[2] Governments are urged to "adopt national legislation, regulation or other suitable measures" to implement the *Code*. Manufacturers and distributors, "independently of any other measures" are instructed (in Article 11.3) "to ensure that their conduct at every level" conforms to the Code. Non-governmental organizations, professional groups, institutions and individuals are to draw the attention of manufacturers and governments to activities which are incompatible with the Code.

Problematic marketing and promotion practices

Before the adoption of the *Code*, egregious marketing and promotion practices were rampant. Companies sponsored "pretty baby" shows and hired "mother-craft nurses" to visit homes and maternity wards. Radio jingles and print ads led to widespread consumer recognition of the products. The medical profession was targeted as a promotional ally – free samples at the health clinic and supplies from the maternity ward meant, to mothers, that the product was medically endorsed. Doctors and health facilities received various material benefits, everything from pens and key chains to cash payments and trips abroad, for their implied or explicit endorsement.

While some of these practices continue today, promotion has generally taken more subtle forms, with companies frequently "misinterpreting" the *Code* to justify their actions. For example, the companies will not concede that the *Code* is intended to be applied universally, and not just to developing countries. Under this cover, hospitals in industrialized countries receive large cash grants (sometimes in the millions of dollars) in exchange for using and distributing particular brands of infant formula. Some companies, in direct violation of the *Code*, have established toll-free "hot lines" to give mothers "infant feeding advice" from company personnel.

Some companies argue that the *Code* only applies to "infant formula", one type of breastmilk substitute, to justify their continued promotion of other types, such as "follow-up formulas" and other complementary foods

[2] See Leah Margulies, "Implementation and Monitoring under the International Code of Marketing of Breastmilk Substitutes", *NU News on Health Care in Developing Countries*, Vol. 10 (January 1996), ICH, Uppsala.

which are used to replace breastmilk. Some manufacturers have developed generic beautiful baby posters with the company name and logo, as a way to get around the provision banning posters promoting products. Almost all companies ignore most of the requirements for informational and educational materials. And there have been numerous debates over many years about how to interpret the ban on free and low-cost supplies, leading the World Health Assembly to declare unambiguously that governments should "ensure that there are no free or subsidized supplies of breastmilk substitutes or other products covered by the [*Code*] in any part of the health care system."[3]

These problems can be effectively dealt with at the national level by drafting comprehensive and specific national rules. Indeed, some countries have established committees authorized to expand the list of products covered by the law or recommend other restrictions in response to new products and new marketing strategies.

The historical context

Three major historical forces and trends interacted in a particularly compelling manner and supported the movement towards the *Code's* development.

1. *The specific rights proclaimed in the Code emanate from the human rights instruments of the United Nations*

The *Code* is, in fact, an international human rights instrument which protects specific rights enumerated in the *Universal Declaration of Human Rights* and subsequent human rights law. Narrowly written to address specific maternal and infant health and nutrition concerns, the *Code* affords the protections sought in other human rights instruments. Its provisions fall under the economic, social and cultural spheres of human rights law.

The *Universal Declaration of Human Rights*[4] declares that every person has the right to life and is entitled to fundamental rights to ensure that he or she lives with the dignity and freedom to which they are entitled. In addition to civil and political rights, the *Declaration* enumerates certain economic, social and cultural rights. These include a standard of living which ensures health and well-being, food and medical care.

Due to the special vulnerability of children, the *Declaration* also states that "motherhood and childhood are entitled to special care and assistance." The *Code* was crafted to afford such special care to mothers and children. Indeed,

[3] World Health Assembly, *Resolution WHA47.5*, para. 2.(2).

[4] Adopted by the General Assembly of the United Nations, December 10, 1948.

the *Code* opens by "Affirming the right of every child and every pregnant and lactating woman to be adequately nourished as a means of attaining and maintaining health".

The late 1970's and early 1980's were a very fruitful time for the development of human rights law within the intergovernmental organizations. Nations emerging out of colonial status became members in their own right of the General Assembly and the other decision making bodies of the United Nations organizations. Establishing international human rights standards through intergovernmental negotiated legal instruments was an important step in giving legal standing to the rights proclaimed in the *Universal Declaration of Human Rights* for all the Member States of the United Nations, and especially for the new nations of the South.

Although the *Universal Declaration of Human Rights* was adopted as a non-binding resolution by the General Assembly, its definitions and descriptions of the rights to which all persons are entitled have become accepted as authoritative. In addition, in 1976 the two treaties designed to guarantee the rights enumerated in the *Declaration*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* entered into force.

The *International Covenant on Economic, Social and Cultural Rights* recognizes the right to enjoy "the highest attainable standard of physical and mental health", including the reduction of infant mortality and the healthy development of the child.[5] This is elaborated upon in the Preamble of the *Code*: "inappropriate feeding practices lead to infant malnutrition, morbidity and mortality in all countries, and improper practices in the marketing of breastmilk substitutes and related products can contribute to these major public health problems."

Just prior to the decision by the World Health Assembly to develop the *Code*, the General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women*.[6] Article 10 of the *Convention* protects access to information to ensure the health and well-being of families; Article 11 confers the right to health "including the safeguarding of the function of reproduction" and Article 12 assures "adequate nutrition during pregnancy and lactation," thus recognizing the importance of lactation. The *Code* has specific provisions which address these concerns, based on the fundamental principle that breastmilk substitutes "should not be marketed or distributed in ways that may interfere with the protection and promotion

[5] *International Covenant on Economic, Social and Cultural Rights*, Article 12.

[6] The *Convention on the Elimination of All Forms of Discrimination Against Women* entered into force on September 3, 1981.

of breastfeeding."[7] As stated previously, specific articles are designed to insure that information and education on infant feeding are not tainted with a commercial sales message, overt or subtle.

The health and nutrition rights which the *Code* aims to protect are now strengthened by the *Convention on the Rights of the Child*, which was adopted by the General Assembly 20 November 1989, and came into force on September 2, 1990. There are numerous articles of the *Convention* that are supportive of the intent of the *Code*, particularly the right of children to the highest attainable standard of health, by, among other things, reducing infant mortality, and promoting breastfeeding.[8]

As a human rights instrument, the *Code* exemplifies how governments can transform general human rights into a specific intergovernmental policy to be used as the basis for national law. This is one strategy for transforming soft international law into hard enforceable law that assures specific rights.

2. *The trend towards preventive health care and health advocacy by the UN health organizations led to the development of the Code*

The entry into the governing body of WHO by numerous new developing countries led to a change in its overall direction. By 1979, the year the World Health Assembly (WHA) approved the development of a code, it also adopted a new slogan, "health for all by the year 2000", to signal the transformation of the focus of the UN health organization from promoting the medical, curative model of health care used in industrialized countries to the preventive health care model needed by the developing nations. Breastfeeding was lauded as one of the four pillars of preventive health care. It is in this context that the Member States of WHO and UNICEF began formally criticizing the inappropriate promotion practices for breastmilk substitutes which competed with breastfeeding.

In 1970, the Pan American Health Organization (PAHO), a regional arm of WHO, anticipated the *Code* in adopting guidelines to prevent advertising of commercial milk, access to health care facilities by "commercial milk" nurses, and acceptance of "free" milk samples.[9]

In 1974, the Twenty-Seventh World Health Assembly adopted a resolution criticizing sales promotion practices which persuade mothers that breastfeeding is inferior to manufactured breastmilk substitutes, and urging countries to review promotional activities on baby foods and introduce appropriate remedial measures, including advertising codes and legislation where

[7] *International Code of Marketing of Breastmilk Substitutes*, Preamble, para. 6.

[8] *Convention on the Rights of the Child*, Article 24, paras. 1 and 2.

[9] *Guidelines to Young Child Feeding in the Contemporary Caribbean: Pan American Health Organization Scientific Publication #217* (PAHO, 1970).

necessary.[10] Then, in 1978 (one year before the WHO/UNICEF sponsored meeting which recommended the development of a code of marketing) the Assembly adopted a resolution recommending that member states, to prevent malnutrition in pregnant and lactating women, infants and young children, support and promote breastfeeding and regulate inappropriate sales promotion of infant foods that can be used to replace breastmilk.[11]

Similarly, the 1978 UNICEF report "Trends in Breastfeeding and Their Impact on Child Health" stated:

> Breast milk meets all the nutritional needs of the young infant. No other known food preparation does so as effectively ... Through advertising of breastmilk substitutes, mothers are told and consistently reminded of products that are held up to be equal if not better than breast milk.

The fact that these policy commitments had been accepted by the Member States of WHO and UNICEF for more than a decade was an important element in overcoming the political resistance to the *Code*. This lay the groundwork for the concluding words of the *Code's* Preamble, that "the marketing of breastmilk substitutes requires special treatment, which makes usual marketing practices unsuitable for these products."

3. *Political forces affected the Code's development*

Before the debt crisis and structural adjustment demands effectively stopped it, the new nations of the South attempted to rectify the imbalances in the legacy of Colonialism by joining together to call for a New International Economic Order which was to have assured a greater degree of national control over the direction of and the fruits of development. This struggle for control over development was being acted out in various UN fora. Under the auspices of the United Nations Centre on Transnational Corporations (created, in part, to assist developing countries in negotiating fair investment contracts with transnational companies), the General Assembly was considering the terms of a code of conduct to govern relations between governments and transnational companies, many of which had economies far larger than that of the states themselves.[12] At the United Nations Conference on Trade and Development (UNCTAD), a highly politicized debate was underway on how to transfer technology from industrialized to developing nations.

[10] World Health Assembly, *Resolution WHA27*.

[11] World Health Assembly, *Resolution WHA31* (May 24, 1978).

[12] After years of indecisive negotiations, the development of the *Code* was dropped from the UN agenda soon after its sponsor, the United Nations Centre on Transnational Corporations, was eliminated through a UN reorganization.

In the World Health Organization, industrialized and developing countries were battling over whether and how to rein in the vast numbers of pharmaceutical products that were now entering the markets of developing countries without any controls, endangering health and overwhelming fledgling domestic industries. For the most part, industrialized countries, home to the corporate headquarters of the largest transnational companies, found themselves representing the companies' needs and demands. The call for a New International Economic Order (NIEO), while receiving a hostile response from the governments of most industrialized nations, was gaining support among a wide range of non-governmental organizations. These groups, throughout the industrialized countries, generally supported the concept of the NIEO, and considered poverty and lack of development as the main barriers to creating strong countries capable of extending democratic principles. Newly emerging nations needed to control the pace and direction of development to lift their citizens from poverty and enjoy the rights envisioned in the UN *Charter* and *Universal Declaration of Human Rights*.

By the mid-1970's, non-governmental advocacy groups in the United States and Europe were campaigning to stop the promotion of breastmilk substitutes using a wide variety of tactics, including exposés, boycotts, shareholder campaigns, and lawsuits. At issue was the transfer of two inappropriate technologies to developing countries – bottle feeding, which requires literacy, knowledge of sterilization techniques, access to clean water, and money to buy enough of a breastmilk substitute, for safe use, and sophisticated marketing and promotion practices aimed at creating the need for these expensive, potentially harmful, Western middle-class products among the Third World poor.

At informational hearings in the US Senate in 1978, corporate executives testified that they were unwilling substantially to change their marketing practices since they were not responsible for the conditions – contaminated water, illiteracy, and the lack of resources to purchase enough of the product – that led to the predictable harms to infant health from using breastmilk substitutes. Following this, Senator Edward Kennedy, along with thousands of advocates, sought action by the World Health Organization. An expert group meeting in 1979 recommended the development of a code, and the idea was authorized by the 1980 World Health Assembly.

The parties to the *Code* negotiations included representatives of Member States of the World Health Assembly; officials of the World Health Organization, UNICEF, and other intergovernmental bodies; representatives of the major international producers of breastmilk substitutes; and leaders of the non-governmental organizations who were campaigning to end promotion of breastmilk substitutes. This was the first time NGOs participated to this degree

in intergovernmental negotiations. In the WHA, an alliance grew between the Northern advocacy groups and the Southern governmental representatives, buttressed by the several Northern European governments who tended to be sympathetic to developing country demands and who, in addition, didn't have a strong domestic breastmilk-substitutes industry.

The NGOs brought to the WHA a team of advocates from North and South countries, armed with the latest scientific research on the benefits of breast-feeding and examples of egregious promotional practices from around the world. Even though the NGOs couldn't participate in the formal debate, their presence and the issues they were presenting had an electrifying affect on the normally more stolid proceedings. For the first time in history, international standards, sanctioned by the UN, were established to control the excesses of a large multinational industry.[13]

Elements of the Code struggle adaptable to other issues

A crucial feature in any attempt to create an international intergovernmental instrument implementing human rights standards is the necessity of bringing about a working alliance between the sympathetic governments – usually those most affected by the problem – and the advocacy NGOs. In this partnership, it is the job of the NGOs to insure the accessibility and accuracy of the latest relevant scientific information and data. Reliable research and data proving or demonstrating harm are necessary to challenge economically profitable practices of major industries. Government officials will rely on this information to strengthen their negotiating positions on behalf of reform. In 1980–81 it was innovative for NGOs to be present at intergovernmental negotiations. Now it is common – the debate being to what degree and when rather than whether. The effect on any intergovernmental meeting of the active presence of advocacy NGOs is likely to be enormous.

If the issue in question involves a particular corporate sector, which is often the case for specific problems relating to nutrition, health safety, or the environment, the language of the intergovernmental instrument must specifically address the obligations and responsibilities of that sector. The *Code* broke new ground in this regard and addressed the responsibilities not only of governments, but the responsibilities of manufacturers and distributors of breastmilk substitutes, as well as those of health workers, non-governmental

[13] Estimates as to the size of the world market for infant formula (one of many breastmilk substitute products) for the year 1990 range from $3.9 billion to $6.5 billion. See S. Prakash Sethi, *Multinational Corporations and the Impact of Public Advocacy on Corporate Strategy: Nestlé and the Infant Formula Controversy* (Boston: Kluwer Academic Publishers, 1994), especially Chapter 9.

organizations, professional groups and consumer organizations. Specifying the responsibilities of non-governmental actors in the intergovernmental instrument will make easier the task of translating the instrument into national law.

At the time of the *Code's* adoption, its status as a non-binding resolution was a disappointment to the NGOs who were advocating for a regulation, a more binding instrument under the WHO Constitution. But, like the *Universal Declaration of Human Rights*, this "expression of the collective will of the membership of the World Health Assembly"[14] carries a moral force and power in the world at large far beyond the Assembly's Constitutional right to make recommendations to its membership. It establishes internationally agreed upon minimum standards for *all* countries regardless of their economic status. Companies feel obligated to profess adherence to it. However, no formula company, in fact, fully follows the *Code*. Companies that state that the *Code* is their policy actually only claim to apply it in developing countries.

Since the *Code* was adopted as a "minimum requirement",[15] it sets the floor for acceptable standards rather than the ceiling. This is particularly important for policies that deal with marketing practices and products. Since marketing practices and product lines change in response to market conditions, establishing minimum standards allows for flexibility in standard setting. Indeed, a number of national laws implementing the *Code* have provisions setting forth the procedures for revising the law and expanding the scope of covered products in response to changes in marketing and promotion strategies.

Another element to be included when developing similar human rights instruments is the requirement that the issue appear regularly on the forum's agenda. The resolution authorizing the *Code's* development[16] and the resolution adopting the *Code* both require biannual reports on the promotion of breastfeeding and the status of implementation of the *Code*. By keeping the issue alive on the organization's agenda, governments will have up-to-date information, and the debate between NGOs and companies will be held in the public intergovernmental arena.

Moreover, appearing regularly and predictably on the agenda has meant an opportunity every two years to adopt resolutions which further clarify and strengthen the *Code*. To date, three subsequent resolutions have adopted clarifications and additional recommendations *vis-à-vis* the *Code*. As a result, the World Health Assembly often refers to its adopted policies in this area collectively as "the *International Code* and subsequent relevant resolu-

[14] World Health Organization, *Resolution WHA34.22* adopting the *International Code of Marketing of Breastmilk Substitutes*, Paragraph 2.(1).

[15] World Health Assembly, *Resolution, WHA34.22*, Preamble.

[16] World Health Assembly, *Resolution, WHA33.32*, Paragraph 6.(7).

tions".[17] All parties understand the significance of this requirement, and over the years, there have been several attempts (led by governments that are the home countries for the corporations affected) to remove the issue from the WHA agenda.

Since the *Code* was adopted as a non-binding resolution, the WHA took particular care to urge all Member States "to translate the *International Code* into national legislation, regulations and other suitable measures."[18] Because the *Code* envisions that governments will translate it into legislation, enforcement should become a function of the national regulatory structures. However, translating the *Code* into national law, and then monitoring and enforcing that law is a process that takes years.

Unfortunately, one area where the *Code* is weak is its failure to establish at the World Health Organization, or other intergovernmental body such as UNICEF, a Secretariat to fully monitor not only national law development, but whether the practices of specific manufacturers and distributors conform to the *Code*. Such a Secretariat was envisioned in various drafts of the *Code*, but was defeated during the negotiation process. This is an important element to incorporate into a similar human rights instrument.

The growth of IBFAN

The International Baby Food Action Network (IBFAN) was born when NGOs from both North and South countries met in Geneva at the WHO to strategize how best to influence the expert meeting they were attending to support the development of a *Code*. From the outset, they understood the necessity of publicizing up-to-date information and examples of the ongoing promotional practices of the industry. Since 1980, IBFAN has biannually produced an in-depth compendium of company promotion practices and violations of the *Code*. Over the last 17 years, IBFAN has grown from a handful of people to a world-wide network of groups in over 90 countries. IBFAN's International Code Documentation Centre in Penang has trained approximately 200 government officials from 80 countries on *Code* development and implementation.[19] The effort and commitment of IBFANers has been key in keeping breastfeeding and the *Code* on the international agenda, and in moving the *Code* from a set of recommendations on paper to enforceable national law. This unique

[17] World Health Assembly, *Resolution WHA47.5*, Paragraph 3.(8).

[18] World Health Assembly, *Resolution WHA34.22*, Paragraph 2.(2). See also the *International Code of Marketing of Breastmilk Substitutes*, Art. 11.1.

[19] See Alison Linnecar, "The International Breastfeeding Movement: Challenges for the year 2000", *NU News on Health Care in Developing Countries*, Vol. 10 (January 1996), ICH, Uppsala.

achievement has inspired the creation of other international NGO advocacy efforts, such as the Pesticides Action Network (PAN) and Health Action International (HAI).

The baby friendly hospital initiative

In 1992, UNICEF and WHO launched the Baby Friendly Hospital Initiative (BFHI). This was the first time since the *Code's* adoption that significant international resources and personnel would be devoted to promoting breast-feeding and urging governments to act to restrict promotion of breastmilk substitutes. BFHI has two complementary goals. The first asks hospitals to transform their practices actively to support rather than discourage breast-feeding by following the Ten Steps to Successful Breast-Feeding.[20] The second asks governments to enact policies or laws stopping companies from distributing free or low-cost supplies of breastmilk substitutes to health care facilities. Health systems which have to purchase breastmilk substitutes are more likely to use them only when needed for a specific child, rather than to routinely feed all infants in the facility.

UNICEF and WHO relied on the promise made by the trade association of breastmilk manufacturers that its members would stop giving free supplies in developing countries only so long as governments adopted policies that would make this a requirement for all companies. From the outset, there were significant differences between what the companies were prepared to do and the policies that the intergovernmental bodies were urging governments to adopt, since these had to be consistent with the *Code* and subsequent resolutions. As stated previously, in 1994 the WHA attempted to resolve any future disputes by supporting a total ban on donations of free and low-cost supplies to the whole health care system. Today, as a result of the BFHI, there are more than 7,000 hospitals that have been designated "Baby Friendly". All but one or two of the developing countries where free supplies were distributed have adopted policies, regulations or laws banning such donations.

Adopting a policy, however, doesn't necessarily mean *enforcing* a policy. Therefore, monitoring and enforcement remain ongoing issues. BFHI's focus on a regulatory instrument to control marketing stimulated renewed interest in the *Code* as whole, and the transformation of the *Code* into national law has greatly accelerated as a result.

[20] The *Ten Steps to Successful Breastfeeding* range from "have a written breastfeeding policy" and train all staff to implement it, to "give newborn infants no food or drink other than breast milk, unless *medically* indicated." A copy may be obtained from UNICEF, 3 UN Plaza, New York, NY 10017.

Development of national law

Nearly 30 countries have adopted the *Code* as law, and others are in various stages of law development. Still others have adopted the *Code* with weaker legal status and various degrees of comprehensives. Thus, it is now possible to review the benefits and pitfalls of different experiences. As indicated in the following brief accounts, some countries, like India and Zimbabwe, developed their laws with active NGO participation. In China the law was developed by government without strong NGO involvement. In Guatemala, the law was challenged as violating free trade rules.

India

In 1992, after ten years of intense negotiations and lobbying, India adopted the *Infant Milk Substitutes, Feeding Bottles and Infant Foods Bill.* By 1993, the government introduced regulations for implementation, including very specific label requirements. National consumer advocacy groups, breastfeeding promotion groups, and pediatrics and child care associations, lobbied for the bill's adoption. The most unique and innovative aspect of the bill is its authorizing of voluntary organizations to bring criminal complaints for violations of the act for prosecution by an Assistant Public Prosecutor.[21] Complaints have now been brought by voluntary organizations against Johnson & Johnson, Nestlé and a local manufacturer. In November 1995 Johnson & Johnson announced it was ending marketing baby bottles in India. The complaint against Nestlé concerns its failure to translate important warnings on baby milk tins into Hindi (India has a population of 950 million, of which half are literate in Hindi and less than 4% read English). Nestlé failed to appear on two court dates, and is challenging the act as arbitrary and unconstitutional. The case is currently under consideration by the New Delhi High Court.[22] The enforcement role given to voluntary, non-governmental organizations is effective and crucial. This procedure should be followed in other countries, particularly where government resources for health inspectors and consumer protection agencies is limited.

Zimbabwe

In Zimbabwe, as in several other smaller countries, there is a useful overlap of membership between women's health and breastfeeding promotion

[21] *The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Bill of 1992*, Article 21, India.

[22] *Baby Milk Action Update 16*, August 1995, p. 1 of *Boycott News*; *Baby Milk Action Update 19*, August 1996.

organizations and government agencies. This overlap has influenced the high degree of government commitment to the *Code* and breastfeeding promotion. From 1981 on, the Government of Zimbabwe has been actively involved in educating health personal and circulating rules to health facilities restricting promotion. By 1984, a code was adopted, which was incorporated into the national *Public Health Act* in 1986. Zimbabwe's law has a broad scope. It applies not only to infant formula but to follow-up formulas and other foods for use by infants and young children up to three years of age.

Until the trade liberalization policies of the last few years, Nestlé had a virtual monopoly of the market, and thus faced little competitive pressure. Now, with more products available, increased competition can result in more promotion. Therefore, there is a greater need for monitoring and enforcement. A government survey in 1994 found that exclusive breastfeeding is uncommon and early supplementation is a significant problem, although 95% of the babies are breastfed at 10–11 months of age. In addition, Zimbabwean families are too poor to spend precious resources on commercial breastmilk substitutes. The cost of purchasing enough of a commercial product for a one month period ranges from 78% to 140% of the monthly minimum wage. For these reasons, Zimbabwe is now in the process of revising its 1986 regulations, with the involvement of both non-governmental organizations and industry representatives. The non-governmental organizations are seeking the regularization of monitoring to ensure that marketing practices conform to the national law and the *International Code*. As leaders of IBFAN Africa, they are also working towards a coordinated, regional effort for law development and monitoring in Sub-Saharan Africa.[23]

China

It appears that China's Ministry of Health became committed to drafting a national law based on the *Code* as a result of its involvement with the Baby Friendly Hospital Initiative. In 1992, as part of BFHI, it issued an administrative notification to stop permitting free supplies of breastmilk substitutes in health care facilities. The notification also banned advertising, promotion and financial support from companies. Thereafter, it began in earnest to draft a law. For public health officials, fast action was imperative since the opening of the Chinese market would be accompanied by aggressive competition among companies, to the detriment of breastfeeding.

[23] This information is drawn from Rufara Charity Madzima, "The Code: The Zimbabwe Experience", *NU News on Health Care in Developing Countries*, Vol. 10 (January 1996), ICH, Uppsala.

China's law took effect on October 1, 1995. However, comprehensive monitoring and enforcement is probably years away. In many countries, monitoring has been largely conducted by NGOs involved in breast-feeding advocacy, often with government approval and sometimes support. China, however, lacks this kind of local NGO involvement. An unusual situation has developed in China because the internationally respected children's aid society, Save the Children, began to monitor company practices. It has now asked the Chinese Government to investigate its findings that Nestlé "has made Lactogen [infant formula] widely available in six hospitals in Kunming, where it has targeted health professionals with both free and discounted supplies of the formula."[24] This public airing of their complaint of violations came after a year of private effort by Save the Children to prod Nestlé's chairman to take action against the abuses. Nestlé repeatedly denied the allegations, and conducted, according to Save the Children, an inadequate investigation of the situation.

The Chinese law, which came into force during this controversy has a number of provisions that are stronger than the *Code*, including ending gifts and donations to academic bodies. Sanctions against violators can include fines and orders to stop marketing. However, China is a very large country with little ability to monitor and enforce the law, particularly without an aggressive NGO movement. Enforcement may depend on the good-will of aid organizations such as Save the Children. Hopefully, country-based offices of international agencies such as UNICEF will assist the government in monitoring adherence to its law.

Guatemala and Costa Rica

Using the *Code* as a "minimum requirement", Guatemala included all complementary foods – not just bottle-fed ones – in its 1983 law. But in 1992, the Gerber Company began a campaign to pressure the Guatemalan government to exempt Gerber from the law because it was introducing a new product line of complementary foods into Guatemala and other countries in the region. Gerber began advertising on TV, and insisted that its labels continue to depict the Gerber baby, both in clear violation of the national law and the International Code. After the Ministry of Health refused to exempt Gerber, Gerber brought numerous legal actions and enlisted the United States State Department and Central American economic ministers to its cause. At stake was Guatemala's trade status with the US and a threatened ban of imports under the regional free trade agreement.[25] After three years of pressure, Guatemala

[24] UK Save the Children Press Office *Briefing, July 1996*. See also William Lewis, "Charity asks Beijing to Probe Baby Milk Allegations", *Financial Times*, July 8, 1996.

[25] *Baby Milk Action Update*, February 18, 1996.

caved in and its Supreme Court exempted imported baby foods from the scope of the national law. The anomalous effect is that Guatemala may now be in violation of the regional and GATT free trade regimes since imported products are given preferential treatment under national law. Unfortunately, only the government has standing under World Trade Organization rules to challenge this preference, which, under the circumstances, will surely never happen.

A similar campaign is under way in Costa Rica, where industry is alleging that Costa Rica's new national law implementing the Code imposes non-tariff barriers to trade.

Monitoring the International Code

While the *Code* tells governments to give effect to the Code, as appropriate to each government's social and legislative framework, through the adoption of "national legislation, regulations or other suitable measures,"[26] it also instructs companies that "independently of any other measures taken for implementation," they should monitor their marketing practices and take steps to ensure that their conduct at every level conforms to the *Code*.[27]

Although industry consistently argues in favour of voluntary compliance with the International Code, and voluntary national codes in lieu of law, the companies individually, or collectively through their industry association, have failed to monitor their compliance with the *Code* provisions. To date, most *Code* monitoring has been undertaken by groups associated with IBFAN. In 1994, IBFAN coordinated a monitoring exercise involving country level monitoring projects in 23 countries, and their report, *Breaking the Rules 1994*,[28] included information received from 62 countries.

Companies have gone to great lengths to deny what is in the IBFAN reports. As a result, there has been a great deal of confusion and disagreement about company compliance with the *Code*. Seeking the truth, a consortium of children's aid, academic and church organizations called the Interagency Group on Breastfeeding Monitoring (IGBM)[29] commissioned research in

[26] *International Code of Marketing of Breastmilk Substitutes* (Geneva: WHO, 1981), Article 11.1,

[27] *International Code of Marketing of Breastmilk Substitutes* (Geneva: WHO, 1981), Article 11.3

[28] *Breaking the Rules 1994* was published by Baby Milk Action, Cambridge.

[29] IGBM has 29 member organizations including the UK Committee for UNICEF, Save the Children-UK, World Vision UK, Centre for International Child Health/Institute for Child Health, British Medical Association, World Council of Churches, and the Churches of England (Board for Social Responsibility) and Scotland, and others.

1996 to obtain objective evidence of violations of the *Code*. While it solicited reactions to its research protocol from the industry and IBFAN, it conducted its research independently of both groups.

The IGBM study was carried out in Poland, Bangladesh, Thailand and South Africa. The research design randomly selected pregnant women, mothers of infants and health workers for interviews, with a target sample size in each country of 120 health workers and 800 mothers and mothers-to-be at 40 health facilities. The results, published in a report entitled *Cracking the Code*,[30] proved, again, that companies "are taking action which violates the *Code*, and in a systematic rather than one-off manner."

In all four countries, company information not in compliance with the *Code* was given to mothers and health facilities; mothers and health workers received free samples; company personnel visited health facilities in ways that contravened *Code* restrictions; and, posters and products were improperly displayed. The findings created headlines throughout Europe, and calls for increased pressure on the companies to conform to the *Code*. The report indeed confirms that monitoring, whether of the *Code* or of national law implementing the *Code*, must be undertaken independent of the manufacturers and distributors of breastmilk substitutes. Most importantly, though, the report underscores the need to move expeditiously towards national law implementation, coupled with the political will to monitor and enforce the law. This is clearly the only way to assure that mothers and children will have the rights the Code seeks to protect.

Conclusion

In 1996, after defeating an attempt to remove the issue of the *Code* from the regular agenda, the World Health Assembly adopted a new resolution urging Member States to ensure that *Code* monitoring is "carried out in a transparent, independent manner, free from commercial influence".[31] This is an issue of increasing importance, as demonstrated by the independent IGBM research revealing violations of the *Code*. Indeed, in recent years companies have been trying to influence various monitoring projects by shaping the research protocols or donating large sums of money.

The resolution also appears to clarify other disputed areas of the *Code* by explicitly asking states to protect the full breastfeeding period. While

[30] Interagency Group on Breastfeeding Monitoring, *Cracking the Code* (London: IGBM, January 1997). The report can be obtained from the UK Committee for UNICEF, 55 Lincoln's Inn Fields, London, WC2A, 3NB.

[31] World Health Assembly, *Resolution WHA 49.15*, 25 May 1996.

there have been various interpretations of the language describing which complementary foods are covered under the *Code's* scope, this resolution takes a more inclusive approach by ensuring that all "complementary foods are not marketed for or *used* in ways that undermine exclusive and *sustained* breastfeeding" (emphasis added). In the past, although there is nothing in the *Code* to support this contention, companies have argued that the *Code* was intended to apply only to products used in the first six months of life. This alleged six-month cut-off has now clearly been rejected by the WHA.

Significantly, this resolution also addresses the conflict of interest which may arise as a result of financial support provided to health professionals by companies. Again, this is an area of long-simmering dispute, and its inclusion in the 1996 resolution is a notable achievement.

The *Code* and the three substantive clarifying resolutions[32] clearly demonstrate that only through joint and sustained efforts by non-governmental organizations working with nation-states can transnational companies be restrained. By their very nature, transnational companies are able to operate in ways that transcend national controls. Indeed, many transnational companies have economies far larger than the countries in which they market and invest. The political influence of this kind of economic might is incalculable. The *Code* establishes minimum standards at the intergovernmental level which companies are expected to follow even if a government has not adopted a national law. In addition, governments are called upon to translate the *Code* into enforceable national law. Since the *Code* operates on these two levels, it represents a potent strategy for gaining some control over transnational corporate policies that directly impact citizens who have no other effective means of protection.

The UN and its associated bodies are more accessible to non-governmental organizations than other intergovernmental and multilateral fora, and it is the accepted arena for the development of international human rights law. Therefore, the UN remains the best available arena for developing legal instruments such as the *Code* for holding transnational corporations accountable for practices which clearly violate internationally recognized human rights.[33] The *Code* experience demonstrates a practical and effective way to implement specific provisions in a variety of human rights instruments. By specifically addressing the responsibilities of corporations and other non-state actors, the

[32] World Health Assembly, *Resolutions WHA 39.28, WHA 47.5 and WHA 49.15*. Since the *Code* was adopted as a resolution, *WHA 34.22*, it and its subsequent resolutions have the same legal status under Article 23 of the WHO Constitution.

[33] Negotiations on trade, investment and related economic issues are taking place in non-UN intergovernmental arenas dominated by industrialized countries. In agencies such as the World Trade Organization and the OECD, NGOs have little or no access. NGOs from around the world are currently organizing to gain access.

Code expands the reach of human rights law. It establishes one of the few arenas in which transnational companies can legitimately be called to account as potential violators of human rights under international law.